AMER
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BRIEFS

(4)

SUPREME COURT, U.S.
FILED
APR 28 2005
OFFICE OF THE CLERK

No. 04-1318

In The
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN, et al.

Respondents.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Troy Klein, by and counsel, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis.*

Respondent Klein has previously been declared indigent by the Sanders County District Court in Thompson Falls, Montana and the Montana Supreme Court. Respondent's counsel's affidavit in support of this motion is attached hereto.

Kristina Guest

KRISTINA GUEST
Assistant Appellate Defender
Counsel of Record and
Attorney for Respondent Klein
Appellate Defender Office
P. O. Box 200145
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DATED: April 28, 2005

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In The
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN, et al.

Respondents.

AFFIDAVIT OF KRISTINA GUEST

STATE OF MONTANA)
)ss.
County of Lewis & Clark)

Kristina Guest, being duly sworn, deposes and states:

1. I am an attorney with the Appellate Defender Office.

2. I am employed by the State of Montana.

3. I am a member of the bar of this Court.

4. On August 13, 2001, Troy Klein filed a *pro se* Motion to Appeal *In Forma Pauperis* and Affidavit in Support of Motion to Proceed *In Forma Pauperis*.

5. Mr. Klein declared under oath that he possessed no cash, checking or savings accounts, real estate, stocks, bonds, notes, automobiles, or other valuable property.

6. The Honorable C.B. McNeil, the district court judge in Sanders County, Thompson

Falls, Montana, appointed the Montana Appellate Defender Office to represent Troy Klein on September 12, 2001.

7. The district court judge appointed the Appellate Defender Office after reviewing Mr. Klein's application to proceed *in forma pauperis*. Based on Mr. Klein's application, the court made a finding that Mr. Klein is "indigent and unable to employ counsel on his own behalf or to pay the costs and fees in connection with his appeal."

8. As an attorney for the Appellate Defender Office, I have represented Mr. Klein continuously since the district court's appointment of our office.

9. Mr. Klein was incarcerated continuously from the date of his arrest on July 25, 2000, until his release from incarceration, on January 21, 2005, after the Montana Supreme Court issued remittitur.

10. Mr. Klein has only been released from incarceration for four months. Mr. Klein remains indigent as he attempts to put his life together after almost five years of incarceration.

DATED this 28th day of April 2005.

Kristina Guest
Kristina Guest
Assistant Appellate Defender

SUBSCRIBED AND SWORN to before me, a Notary Public for the State of Montana, this 28th day of April 2005.

Verna D. Stewart
Verna D. Stewart
Notary Public for the State of Montana
Residing at Helena MT
My Commission expires: November 10, 2007

(SEAL)

No. 04-1318

In The
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN, et al.

Respondents.

On Petition For A Writ of Certiorari to the Supreme Court Of The State of Montana

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provision cited by Petitioner, the following is relevant:

Mont. Const., article II, section 10:

Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const., article II, section 11:

Searches and seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. . . .

Additional relevant Montana statutes are set forth in the Appendix.

STATEMENT OF THE CASE

In May of 2000, Christopher Nichols, of the Thompson Falls Police Department, initiated and was placed in charge of an investigation into suspected drug activity at 205 North Gallatin Street. After two months of surveillance, on July 11, 2000, the investigation had yielded the following facts: The residents of 205 North Gallatin were possibly involved in the manufacture of methamphetamine. The residence was large, consisting of three levels with numerous rooms. There was a great deal of traffic in and out of the residence with as many as fifteen individuals in the residence at any given time. The identities and number of actual residents were unknown. An individual matching the description of Troy Klein, a suspected occupant of the house, had purchased ammunition in Thompson Falls. Nichols had a strong suspicion that this individual might actually be Klein, but had no personal knowledge or facts to substantiate this suspicion. The two-and-a-half month investigation, which included surveillance of the home, had yielded no observation or reports of weapons sighted in the home or in the possession of any of the individuals[1]. Klein had a warrant for his arrest in connection with a nonviolent felony parole violation.

On July 11, 2000, although a search warrant had not yet been prepared or issued and the investigation was not concluded, Nichols contacted Allen Bardwell, of the Kalispell Police Department, requesting his assistance in the execution of a search warrant upon the residence. Bardwell was the team leader of the Kalispell Police Department's SWAT team. Based on the information provided by Nichols on July 11, 2002, Bardwell made the decision to accept the request for assistance. Once a

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[1] The Petitioner incorrectly states that "Officer Nichols also learned that Klein had recently purchased ammunition at a local hardware store." Pet. 3. This statement is factually wrong. Nichols testified that an individual matching Klein's description had purchased ammunition. However, in two and a half months of investigation and surveillance, Nichols never confirmed that the individual was Klein.

SWAT team accepts a mission, there is no issue as to the type of entry that will occur. The teams are employed for the specific purpose of carrying out no-knock, forcible entries. Thus, on July 11, 2000, based on the above information, Nichols had already determined that there would be a forcible entry into the residence[2].

Bardwell immediately assumed control over the planning of the operation. As chief planning officer, it was his job to develop the attack plan for the raid. Bardwell testified that, once he agreed to provide assistance to Nichols, any information received after that point would not have impacted his decision to conduct a forcible entry into the residence. Even if informed prior to the raid that there were only two individuals in the residence, he would have conducted a forcible entry. In fact, prior to the raid, when Bardwell learned that there were only six to eight individuals in the home, although he had the assistance of more than twenty officers, neither he nor Nichols reconsidered their entry strategy.

After Bardwell agreed to assist Nichols, he contacted Flathead County Undersheriff, Chuck Curry, asking for Curry's assistance. It was Bardwell's belief that he required more manpower to conduct the raid due to the size of the home and the possibility of multiple occupants. Curry accepted Bardwell's request and subsequently participated with Bardwell in the planning and training phases of the operation. Curry received all information regarding the raid from Bardwell. Contrary to Nichols's testimony, Curry stated that he never spoke with Nichols until the Flathead County SWAT team arrived in Thompson Falls on the night of the raid. Thus, after employing the two SWAT teams' assistance, it would have been solely up to Nichols to call off the tactical teams or to modify the entry plan prior

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[2]The Petitioner incorrectly states that Nichols and the SWAT team officers discussed whether the officers should knock and announce their presence. Pet. 4. Both SWAT team officers testified that SWAT team never knock and announce their presence and that they had never had a conversation with Nichols regarding whether the SWAT teams should knock and announce their presence.

to the raid.

Nichols, a relatively inexperienced officer, who had previously participated in only two residential searches and was acting as lead detective for the first time, testified that SWAT teams were needed because this was a methamphetamine operation. He stated that he had never heard of a knock-and-announce entry when a methamphetamine lab was involved. However, Bardwell and Curry, both seasoned officers, stated that the mere fact that this was a methamphetamine lab warrant would not justify a no-knock entry. Moreover, Bardwell testified that the potential for destruction of the alleged methamphetamine lab was not a concern in deciding to take on the assignment. Both Bardwell and Curry agreed that a methamphetamine lab cannot be destroyed in a matter of five to ten seconds.

On July 13, 2000, Nichols discovered that there was a possible surveillance camera located in the east window of the residence. This information was not available, and therefore, not relied upon by Nichols on July 11, 2002, when he employed the assistance of the tactical teams. Similarly, it was not a factor considered by Bardwell in deciding to accept the request for assistance. According to Bardwell, the alleged counter-surveillance was not a consideration in planning the raid, since the speed of entry would undermine the effectiveness of any surveillance. Bardwell also observed that the entry could be planned in such a manner as to avoid the surveillance camera. In fact, the tactical teams approached the house from the north and west, thereby effectively remaining outside of the range of the surveillance camera.

Bardwell testified that the fact of counter-surveillance was important only to the extent, that if individuals take the trouble and expense to put up counter-surveillance, it's "probably a pretty substantial operation." The state presented no evidence as to the actual size of the operation. Nichols did not express an opinion regarding the significance of the cameras relative to operation size, and did

not indicate that he had discussed this issue with Bardwell or that he was aware of this particular concern.

Nichols submitted an Application for a search warrant to the district court judge on July 24, 2000. Although Nichols knew that he intended to carry out a forcible entry, the search warrant application did not include any expression of this intention, and did not request permission to conduct such an entry.

On the night of July 25, 2000, the two SWAT teams, and other local law enforcement, converged on Thompson Falls at approximately 1:45 a.m. Combined, there were between twenty and twenty-five officers present. They were briefed and waited. While waiting to initiate the raid, Bardwell testified that he and Nichols completed a risk analysis report. Bardwell indicated that he generally used a risk analysis report to determine the necessity for use of SWAT team tactics. Such a report, normally completed at the beginning of an operation, is aimed at assessing the risk associated with specific individuals, who the officers anticipate might be present during a raid. In this instance, contrary to usual practice, the report was allegedly completed by Bardwell while he was waiting at the Thompson Falls Police Department only a few hours before the time set for conducting the raid.

The risk analysis form contains a checklist of criteria to be used in assessing risk in connection with the service of a particular warrant. The form considers whether the suspect: has a record of violence; is on probation or parole; abuses drugs and/or alcohol; is known to be mentally unstable; has a military or police background; is known to associate with organizations with known or suspected violent criminal activity; and/or is known or suspected to possess weapons.

Bardwell stated that Klein was the only person considered in conjunction with the risk analysis assessment, and the only person about whom he had any information prior to entry. He agreed that the

only criterion that applied to Klein was that he was on probation or parole for a nonviolent offense. With regard to the other factors listed in the risk analysis report, Bardwell assumed that there would be drug use by Klein since he was involved in a methamphetamine lab operation. Bardwell also assumed that there might be weapons present in the residence based on information that he had received from Nichols with regard to the purchase of ammunition. Bardwell had no objective evidence to substantiate his assumptions.

Bardwell agreed that there was no record or information of Klein ever being violent, having any violent criminal record, ever resisting arrest or assaulting a police officer, ever possessing weapons, of being mentally unstable, using drugs or alcohol, having a military or police background, or being associated with any organization suspected of violent criminal activity. Bardwell stated that he had no information regarding the identities, characteristics or background of any other individuals in the house. Bardwell felt that the raid was justified based on the information in the report, which, with regard to Klein, included his knowledge of an outstanding warrant and his assumptions regarding Klein's possession of weapons and drug use.

On the night of July 25, 2000, while the SWAT teams and other officers convened at the Thompson Falls Police Department, Nichols ordered two officers to conduct surveillance of the residence. The surveillance officers were secreted in an upstairs bedroom of the house across the street from 205 North Gallatin.

Although Nichols expressed concerns regarding the safety of neighborhood residents, he made no attempt to evacuate any residences. The state presented no facts to substantiate these concerns and no evidence that the occupants of the residence to be searched were dangerous, violent or would present a threat to officers or neighbors. In fact, the surveillance officers stationed in the house directly across

the street from the suspected residence, did not request the residents of the house to leave while the surveillance and raid were being conducted.

Officer Reinshmidt sat in surveillance for more than four hours. At 2:20 a.m., she heard somebody in the driveway yell to get inside and cut the lights. After Reinshmidt heard this statement, she contacted Nichols and reported her observations. Reinshmidt was not able to hear any conversations taking place inside the home.

Based on Reinshmidt's observations, the officers decided that their presence might have been detected. They had originally planned to execute the raid at 4:00 a.m., but because of Reinshmidt's information, chose to accelerate the time of the raid. Nichols testified that they decided to execute the raid immediately after they received Reinshmidt's call. However, the officers did not execute the raid until forty minutes later.

Between 2:20 a.m. and 3:00 a.m., Reinshmidt saw some movement in the kitchen, but no suspicious activity. The occupants of the home had turned out the lights, and the house was quiet. Reinshmidt agreed that her observations were entirely consistent with the residents preparing for or retiring for the night.

At 3:00 a.m., the officers executed their no-knock raid. As the officers approached the home it was quiet, and either all or most of the lights were off. None of the officers detected any activity or heard anything consistent with attempts to escape, resisting arrest, barricading, counterattacks, the destruction of evidence, or the dismantling of a lab, including unusual amounts of activity, toilets flushing, cleaning activity, glass breaking, etc. There was no evidence that any of the occupants had detected the officers' presence or anticipated an invasion. No evidence existed which would indicate the presence of barricades or booby traps.

The teams approached the home from the west and north, outside of the range of the surveillance camera located on the east side of the house. At least seven officers rammed the upstairs door confronting four of the occupants who were in various stages of sleep and preparation for sleep. Another seven officers entered the house through the downstairs kitchen door confronting the two occupants residing in that portion of the house. Surrounding the house were at least another five to ten officers.

As a result of the raid, the state charged the defendants with drug-related felonies, and the defendants filed motions to suppress, which argued that the officers executing the search warrant violated the defendants' federal and Montana constitutional rights by failing to knock-and-announce before the SWAT teams raided the home in the middle of the night.

On June 10, 2002, the district court conducted an evidentiary hearing. The district court explained that, although an issue of first impression in Montana, the court would analyze the question in light of the Fourth Amendment and the heightened expectation of privacy guaranteed to the citizens of Montana by the Montana Constitution. The district court then expounded that the Montana Constitution provides greater protection than that contained in the Fourth Amendment and, additionally, the Montana Constitution provides the right of individual privacy shall not be infringed without a showing of a compelling state interest. The district court concluded that under the Montana Constitution, based on the totality of the circumstances, and facts of this case, the no-knock entry was justified and the Defendants' heightened expectation of privacy was not violated. See, Pet. App. B.

The defendants appealed to the Montana Supreme Court. The Montana Supreme Court recognized that this was an issue of first impression[3] in Montana, and that it would "need to look to our

[3] Subsequently, the Montana Supreme Court has now decided another knock and announce case. *State v. Ochadleus*, ___ P.3d ___ (Mont. 2005). In *Ochadleus*, the court applied

sister states to decide this issue." However, the court emphasized that "[w]e also look to the greater protections afforded to Montanans in search and seizure matters under Article II, Section 10 and 11 of the Montana Constitution." *State v. Anyan*, 2004 MT 395, 325 Mont. 245, 104 P. 3d 511, 517. In so holding, the Montana Supreme Court cited three Montana cases analyzing the greater protection provided by the Montana Constitution. *Anyan*, 104 P. 3d at 517 (citing *State v. Bullock*, 901 P. 2d 61, 75 (Mont. 1995)("Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, broader protection than the Fourth Amendment in cases involving searches of, or seizures from, private property); *State v. Siegal*, 934 P. 2d 176 (Mont. 1997)[4]("[W]hen the people of Montana ratified a new State Constitution in 1972, the explicitly granted the citizens the right to privacy. Thus, Montana's Constitution affords citizens broader protection at the hands of the government in search and seizure cases than does the Federal Constitution"); *State v. Elison*, 14 P. 3d 456, 468-469 (Mont. 2000)(Montana's unique constitutional language affords citizens a greater right to privacy, and, therefore, provides broader protection than the Fourth Amendment in cases involving searches of private property).

The court looked to case law from other states and this Court's holding in *Wilson v. Arkansas*, 514 U.S. 927 (1995). The majority concluded that when an officer is serving a search warrant, he must knock and announce his presence unless there are exigent circumstances which would present a threat of physical violence or the likelihood that evidence would be destroyed if the rule were not followed. However, the opinion recognized that the Wilson Court left to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.

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the factors that it set forth in *Anyan* and held that exigent circumstances did exist to justify the officers' forced entry into the defendants' home.

[4]Overruled in part and on other grounds by *State v. Kuneff*, 970 P. 2d 556 (Mont. 1998)

Anyan, 104 P. 3d at 520. The court then, citing *Richards v. Wisconsin*, 520 U.S. 385 (1997), recognized that Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement in felony drug cases. The court thus focused on the following factors to determine whether exigent circumstances existed in the pending case: safety concerns, futility, and destruction of evidence. Based on its determination of these factors, the Montana Supreme Court concluded that under the Fourth Amendment, the knock and announce rule applies in Montana. However, the court further expanded that "even were it not for that authority, though, Article II, Sections 10 and 11 of the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution." *Anyan*, 104 P. 3d at 524-525 (citing *Bullock*, 901 P. 2d at 75; *Siegel*, 934 P. 2d at 183; *Elison*, 14 P. 3d at 468-469). The court then held that the SWAT teams' forced no-knock entry into the defendants' house was unreasonable under the Fourth Amendment and Article II, Sections 10 and 11 of the Montana Constitution because the state failed to meet its burden to prove that exigent circumstances obviated the necessity to comply with the knock and announce rule.

The court recognized that the knock and announce rule is a flexible one, which will depend on the circumstances of each case. The court, consistent with prior Montana case law, advised that for future cases when officers contemplate a no-knock entry that intention be included on the search warrant application. *Anyan*, 104 P. 3d at 525 (citing *State ex rel. Townsend v. District Court*, 543 P. 2d 193, 195 (Mont. 1975); and *State v. Wilson*, 879 P. 2d 683, 684 (Mont. 1994)). The court concluded that the no-knock entry into the defendants' house violated the defendants' federal and state constitutional rights to be free from unreasonable searches and seizures. Thus, the court held that the trial court erred in denying the defendants' motions to suppress.

Three justices dissented and concluded that the majority: 1) had not relied enough upon *United States v. Ramirez*, 523 U.S. 65 (1998), and *United States v. Banks*, 540 U.S. 31 (2003); 2) had not given sufficient weight to the existence of a surveillance camera; and 3) had not properly considered the totality of the circumstances. The majority responded to the legal and factual arguments raised by the dissent.

REASONS FOR DENYING THE WRIT

I. ADEQUATE AND INDEPENDENT STATE GROUNDS EXIST FOR THE DECISION OF THE MONTANA SUPREME COURT.

Since this was an issue of first impression in Montana, the court recognized that it would need to look to relevant federal and state law. However, from the beginning, the majority opinion stressed that "[w]e also look to the greater protections afforded to Montanans in search and seizure matters under Article II, Sections 10 and 11 of the Montana Constitution." The majority opinion of the Montana Supreme Court concluded that, although under the Fourth Amendment the knock and announce rule applies in Montana, "[e]ven were it not for that authority, though, Article II, Section 10 and 11 of the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution."

In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), this Court held that when a state court decision appears to rest primarily upon federal law or to be interwoven with federal law and when the adequacy and independence of the state court decision is not clear from the face of the opinion, this Court will assume that the most reasonable explanation for the state court's decision is that the state court felt that federal law required it to rule in the manner it did. However, this Court also held that it will not accept jurisdiction if the state court has merely relied upon federal authorities as it would upon case authority from other jurisdictions, and the state court expressly states it is relying upon bona fide, separate and

independent state grounds. This Court, in *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), explained that its independent and adequate state ground doctrine is jurisdictional (citing *Herb v. Pitcairn*, 324 U.S. 117, 124-25 (1945)("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion."). See also, *Sochor v. Florida*, 504 U.S. 527, 533-34(1992)(This Court is without jurisdiction to review the defendant's jury instruction claim because the state court's resolution of the federal law rested on adequate and independent state grounds); *California v. Freeman*, 488 U.S. 1311 (1989)(This Court determined that state court's determination that the defendant's conduct did not constitute pandering based on adequate and independent state ground such that this Court was without jurisdiction to hear the State's petition for certiorari review).

Montana's Constitution includes Article II, Section 10, a right to privacy clause not found in the United States Constitution. Further, although the Fourth Amendment and Montana Article II, Section 11 are nearly identical, the Montana Supreme Court specifically stated that it chooses to provide greater protection in search and seizure matters under the Montana Constitution. As this Court has recognized, its power to review state-court judgments should be used sparingly. "Only in the most unusual case should the Court volunteer its opinion that a state court has imposed standards upon its own law enforcement officials that are too high." *Minnesota v. Olson*, 495 U.S. 91, 102 (1990)(Stevens, J., concurring).

In this case, the Montana Supreme Court clearly stated that it based its decision separately and independently upon Article II, Section 11 and Article II, Section 10 of the Montana Constitution. While the opinion does not contain a statement that the court is relying upon federal authority only for the

purpose of guidance, such a statement clearly is not necessary since the Montana Court looked to *Wilson* and *Richards* to explain the history and factors to consider with regard to the knock-and-announce rule, and then conducted its own detailed discussion of the facts and the factors the Montana Court considered important in this case, in conjunction with the Montana Constitution. In *Wilson*, this Court specifically left it to the state courts to determine the factors of when a no-knock entry is unreasonable. *Wilson*, 514 U.S. at 936 ("[W]e leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."). Given the greater protection provided by the Montana Constitution, the Montana Supreme Court was free to evaluate the evidence pursuant to Montana state court standards of the totality of the circumstances.

Further, the Montana Court did not rely exclusively on federal law for its guidance. Rather, besides federal law, the court looked to precedent from other states. The majority opinion cites to six decisions from five other states in support of its historical analysis and development of the factors to consider. Moreover, the majority opinion analyzed *Richards*, *Ramirez*, and *Banks*, but held that the facts present in those cases were dissimilar to those in *Anyan*, and commanded a different result. The fact that the Montana Supreme Court only used Wilson for historical background and distinguished the facts of *Richards*, *Ramirez*, and *Banks* clearly indicates that the Montana court did not feel it was required to be bound by federal law and grounded its decision upon state law.

Even when a state court announces a new legal rule, arguably derived from both federal and state law, the state court can still definitely render a decision based on adequate and independent state grounds. *Ohio v. Robinette*, 519 U.S. 33, 44 (1996)(Ginsburg, J., concurring)(citing *State v. Fuller*, 915 P. 2d 809, 816 (Mont.) cert. denied, 519 U.S. 930 (1996). Here, the Montana Court stated, besides

looking to federal law, it would look to law from other states, and the greater protections provided by the Montana Constitution to decide the issue. *Anyan*, 104 P. 3d at 517. Nowhere in the opinion does the Court state that federal precedent controlled its decision. Rather, in its conclusion, the court, just as it did in *Fuller*, specifically states, notwithstanding the Fourth Amendment, that its decision is based upon Article II, Sections 10 and 11 of the Montana Constitution. *Anyan*, 104 P. 3d at 524-25. This statement shows that the Montana Supreme Court relied upon independent and adequate state grounds.

II. THE STATE'S PETITION IS BASED ON FACTS NOT INCLUDED IN THE RECORD REVIEWED BY THE MONTANA SUPREME COURT IN REACHING ITS DECISION.

A. The Petitioner has failed to set forth an accurate statement of the case.

The Respondents contest the Petitioner's Statement of the Case as containing inaccurate facts and evidence not introduced into the record before the district court or the Montana Supreme Court. At the suppression hearing, the district court heard testimony from SWAT team leader Alan Bardwell, SWAT team leader Chuck Curry, and Thompson Falls Police Officer Shawna Reinschmidt, and received into evidence an affidavit signed by Bardwell (A copy of Bardwell's affidavit, which was introduced into the record at the suppression hearing, is attached as App. 1), and an example of the risk analysis form used by Bardwell. The district court also accepted into the record a deposition of Officer Chris Nichols taken prior to the suppression hearing.

The Petitioner's Statement of the Case before this Court is derived almost exclusively from affidavits by Nichols and Bardwell. Neither of these affidavits were received into evidence during the suppression hearing. Nichols's affidavit was prepared by the county attorney months after Nichols requested the search warrant. Although referenced by the county attorney during the Nichols's deposition, the county attorney did not introduce Nichols's affidavit into the record at the deposition or the suppression hearing. Bardwell's affidavit, which was attached to the Petitioner's Appendix, was

not the affidavit introduced into the record at the suppression hearing. Bardwell's affidavit, that the Petitioner now relies upon, was never introduced into the record during the suppression hearing nor even referenced during the suppression hearing. Further, the state of Montana never referenced this affidavit during its briefing or oral argument before the Montana Supreme Court. Moreover, the district court did not reference facts from either of these affidavits in its Findings of Fact and Conclusions of Law.

In critique of the Montana Supreme Court, and its conclusion based on the totality of the circumstances, the Petitioner requests that this Court re-evaluate the facts of this case. In support of its factual arguments, the Petitioner neglects the evidence presented during the suppression hearing, and instead relies upon evidence not introduced into the record during the hearing (Nichols's and Bardwell's affidavits), and evidence not presented or referenced on appeal to the Montana Supreme Court (Pet. App. D). This Court has previously chastised parties for failing to provide complete and full disclosure of the record. See, *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924)("[W]e have pointed out the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari."). The facts presented to this Court by the Petitioner fail to present a full disclosure of what was presented on the record before the district court, and what both parties to the Montana Supreme Court argued. Thus, this Court should disregard the facts and Statement of the Case as presented by the Petitioner.

B. It is not this Court's role to re-evaluate the evidence.

This Court has repeatedly held that granting of a writ of certiorari is not warranted merely to review the evidence or inferences drawn from it. Rule 10, Rules of the Supreme Court provides, in part, "[A] petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." See also, *Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440, 441 (1918)(Dismissing writ because the matters depended essentially upon an appreciation of the evidence); *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1938) (citing *United States v. Johnston*, 268 U.S. 220, 227 (1925)); C.J.D. *Rudolph v. United States*, 370 U.S. 269, 270 (1962)(Writ of certiorari dismissed because review of facts would have been of no importance except to the litigants themselves). The Montana Supreme Court reviewed in detail the facts presented in the record and determined that exigent circumstances did not exist for the SWAT teams to raid the defendants' home without knocking and announcing. It is not the role of this Court to re-analyze the Montana Supreme Court's determination of facts and evidence.

III. THE MONTANA SUPREME COURT PROPERLY REVIEWED THE FACTS USING A TOTALITY OF THE CIRCUMSTANCES APPROACH.

The state petitions this Court for certiorari based, in part, on its claim that the Montana Supreme Court did not apply a totality of the circumstances analysis in reaching its decision. It accuses the Montana Supreme Court of reviewing each circumstance in isolation and disregarding the cumulative impact of the facts on the determination of reasonable suspicion. It asserts that the Montana Supreme Court's opinion concludes that a no-knock entry may never be established unless there exists at least one factor that, standing by itself, provides complete justification for a no-knock entry. It alleges that the Montana Supreme Court concludes that each potential exigent circumstance must be considered separately rather than collectively. A review of the Montana Supreme Court opinion shows that it contains no such conclusions or hypotheses, and that the method used by the court to analyze the facts clearly comports with a totality of circumstances approach.

The Montana Court's analysis is founded on the rule derived in *Richards* that a no-knock entry is justified if the police have reasonable suspicion that knocking and announcing their presence under

the particular circumstances existing at the time of entry would be dangerous or futile or result in the destruction of evidence. *Richards*, 520 U.S. at 394-95. The Court conducts a thorough analysis of the facts and circumstances as they relate to each of the *Richard*'s factors.

Initially, the Court examines the case in connection with the "dangerous" prong of the *Richard*'s test and finds that the following facts were established: 1) A person who may or may not have been an occupant of the house bought ammunition; 2) One of the occupants was on probation for a non-violent felony offense; 3) Two and one half months of surveillance established no evidence of actual weapons in the house, or that the persons resident therein would use violence or weapons against law enforcement; 4) A generalized claim of hazards associated with methamphetamine labs was belied by the officers' demonstrated lack of concern and failure to take any precautions with respect to the asserted hazards; and 5) There was no evidence that the residents of the house were preparing a counter-offensive or attempting to escape as the officers approached the house.

Using principles established by other state and federal courts for guidance, and keeping in mind the heightened protection afforded to its citizens under the State constitution, the Montana Court concludes that the above facts do not give rise to reasonable suspicion that the officers would have been endangered had they knocked and announced their presence.

The court next examines the issue of futility as a potential circumstance obviating the necessity to break down the door of the house. Noting the state's concession during oral argument that the futility exception does not apply, the court nevertheless observes that there was no indication that the occupants of the house were ever aware of the officers' presence. The raiders approached the house outside of the range of the surveillance camera, and there was no activity, movement or other indication that the residents were aware of the officers' approach. Based on these facts and the state's concession, the court

found that the officers were not entitled to ignore the knock and announce requirement under the futility exception.

The court then reviews the facts to determine whether the officers had reasonable suspicion to believe that evidence would be destroyed if they knocked and announced their presence. The court finds that no evidence was presented by the state that showed that the occupants of the residence were attempting to destroy evidence upon the officers approach or that would justify a no-knock entry based on the possibility of the imminent destruction of evidence after a knock and announcement. The court further noted that the two officers in charge of the operation testified that, in their experience, the mere presence of a methamphetamine laboratory would not justify a no-knock entry, and that a methamphetamine laboratory could not be destroyed in a matter of 5 to 10 seconds. Based on these facts the court determined that destruction of evidence was not a concern justifying a no-knock entry.

The court's opinion recognizes that the knock and announce rule is a flexible rule under which a court must determine whether an unannounced entry is reasonable with reference to the particular circumstances of each case. The court concludes that the knock and announce rule applies to Montana state under the Fourth Amendment, and that it will be analyzed under the principles therein, and the Montana constitution which affords heightened protection to its citizens. The court holds that "on the facts here" the forced entry into the appellant's house was unreasonable under the Fourth Amendment and Montana Constitution.

It is only in response to the dissent's complaint that the majority failed to follow a totality of circumstances approach, that the majority, quoting *People v. Condon* 592 N.E. 2d 951(Ill. 1992), cert. denied, 507 U.S. 948 (1993), explains that it must analyze each potential exigent circumstance individually "since the individual circumstances equal the totality." Indeed, how else can a court

explicate and communicate its decision in a written opinion except by discussing its reasoning with regard to each circumstance separately, prior to assessing the circumstances in their totality.

It is clear from its written opinion that the Montana Supreme Court used the correct technique, reviewing all of the facts and circumstances in the case, and reaching a decision based on consideration of the totality of those facts and circumstances. It is the state that would have the court ignore the totality approach by examining only those facts and circumstances that favor the state's position, while ignoring all other facts. Thus, the state would have the court consider the fact that someone in the house may have purchased ammunition, while ignoring the information that no weapons were ever seen in the house or in the possession of any of the occupants of the house. Further, there was no evidence that the suspects were violent or had ever previously threatened law enforcement. The state would have the court consider the fact that a surveillance camera was present, but not the fact that the camera could easily be, and was, avoided by the approaching raid team. The state would have the court consider the fact that the house may have contained a methamphetamine laboratory, but ignore the fact that a methamphetamine laboratory cannot be destroyed in seconds, and that there was absolutely no indication of any attempt to destroy evidence as the officers approached the house.

The state appears to be suggesting that analysis should proceed by way of the selection and delimitation of facts that the reviewing court can consider, to only those facts which favor the state's case, thereby effectively ignoring a totality analysis (to say nothing of reality) in favor of a structured analysis that includes facts to be determined exclusively by the state.

In its analysis of this case, the Montana Court did not create categories. (see, *Banks*) and did not exclude and delimit the facts and circumstances that it considered. See, *U.S. v. Arvizu*, 534 U.S. 266 (2002). Rather, it performed a thorough and complete analysis of all the facts and circumstances. It is

clear from its methodology and the detailed rationale set out in its opinion, that the Montana Court considered and made its decision based on a totality of the circumstances. The state's claim that the Montana Supreme Court did not apply the proper analysis in reaching its decision is wholly without merit and the petition should be denied.

IV. THE STATE'S PETITION, SEEKING TO CLARIFY THE APPROPRIATE LEVEL OF JUDICIAL SCRUTINY AND THE EXTENT OF THE FACTUAL SHOWING REQUIRED UNDER THE RICHARD'S STANDARD, IS CONTRARY TO PRINCIPLES PREVIOUSLY ESTABLISHED BY THIS COURT IN *RICHARDS*, *BANKS* AND *ARVIZU*.

The state asserts that certiorari should be granted in this case to allow this Court to provide the lower courts with additional guidance in connection with the factual showing required under the reasonable suspicion standard. The state appears to be requesting the Court to indulge in precisely the type of exercise that was disapproved in *Richards*, *Banks* and *Arvizu*.

In *Wilson*, the Court granted to the states the authority to determine the factual circumstances under which an unannounced entry is reasonable under the Fourth Amendment. Subsequently, in *Richards*, it refused to endorse a blanket exception to the knock and announce rule in felony drug investigations. *Richards,* 520 U.S. at 394-95. The Court's refusal to set generalized criteria and rules is based on the obvious fact that no two cases have identical sets of facts. In view of the singular facts of each case "... no template is likely to produce sounder results than examining the totality of circumstances in a given case." *Banks*, 540 U.S. at 35-36.

This Court has consistently refused any attempt by lower courts to create classifications and categories or to delimit the facts for purposes of facilitating the application of the reasonable suspicion standard. See: *Banks*; *Arvizu*:

> Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. *Ornelas*, supra, at 696 (principle of reasonable suspicion is not a "finely tuned standard"); *Cortez*, supra, at 417 (the cause "sufficient to authorize police to stop a

person" is an "elusive concept"). But we have deliberately avoided reducing it to "a neat set of legal rules," *Ornelas*, 517 U.S. at 695-696 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 76 L. Ed. 2d 527, 103 S. Ct.. 2317 (1983)).

Arvizu 534 U.S. at 274 (citing *Ornelas v. United States*, 517 U.S. 690 (1996), and *United States v. Cortez*, 449 U.S. 411 (1981)). "We have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Robinette*, 519 U.S. at 39; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357(1931) (no formula for determining reasonableness; each case on its own facts and circumstances).

The state's request for certiorari to attempt to wring from the Court a generalized formula to use in conjunction with the reasonable suspicion standard is contrary to precedent and completely without merit and the petition should be denied.

CONCLUSION

For the reasons above, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

DATED this the 28th day of April 2005.

Respectfully submitted,

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APPENDIX

Affidavit of Kalispell Police Sargeant Allen Bardwell

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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA, Plaintiff, v. TROY EDWARD KLEIN, Defendant.	CAUSE NO. DC-00-44 **AFFIDAVIT OF KALISPELL POLICE SARGEANT ALLEN BARDWELL**

STATE OF MONTANA)
) ss.
County of Flathead)

ALLEN BARDWELL, being first duly sworn on oath and under penalty of perjury, deposes and states:

1) I am over the age of 18, I am competent to testify and I have personal knowledge of the matters herein.

2) I am a law enforcement officer with the Kalispell Police Department in the State of Montana. My official title with the Kalispell Police Department is Sergeant.

3) I have reviewed my reports and records including the Raid Report dated July 24, 2000 with a supplement of October 5, 2000, regarding the raid and seizure of occupants at 205 North Gallatin in Thompson Falls, Sanders County, Montana occurring on July 25, 2000 at approximately 0245 hours. I personally prepared the report myself as commander of the Kalispell Police Department Team and as commander of the entire operation itself. I also prepared the Risk Analysis report regarding the risks involved in the raid & seizure, which is contained in the file.

4) The Flathead County Sheriff's Office assisted our team (Kalispell Police Department) at the request of the Thompson Falls Police Department in the raid of the house and seizure of occupants.

5) To the best of my knowledge the following individuals from the Kalispell Police Department participated in the raid & seizure on the house and occupants at 205 North Gallatin in Thompson Falls, Sanders County, Montana on July 25, 2000, including: Allen Bardwell (command & breacher), Officer Nasset (lead), Wade Rademacher (follow), Mark Mulcahy (follow), Scott Warnell (follow), James Brenden (follow). To the best of my knowledge there were other state and county law enforcement officers participating also. Furthermore, to the best of my knowledge there were federal law enforcement officers present (and I believe they were ATF).

6) The Kalispell Police Department team was responsible for conducting the raid on the upper floor of the 205 Gallatin premises.

7) I was the "command" person in the raid & seizure on the upper floor of the house & occupants therein, as well as the entire operation. It was by my verbal order on voice activated police radio that the Flathead team and our Kalispell team entered the house.

8) It was my decision not to check to see if the upper-floor closed older wooden door was locked. I did observe that the door opened inward.

9) As a part of the execution of the raid and seizure, I personally rammed the door with a steel ram. The collision broke the lock and\or door jam allowing immediate access to the house. I did not knock on the door nor announce my purpose before ramming the door, for reason of the element of surprise.

10) I ordered the simultaneous entry into the house, by both teams.

11) In executing the raid plan after I rammed the door our Kalispell team entered, whereupon we secured 4 (four) individuals. The Kalispell team and the Flathead team took the occupants by complete surprise, as it was clear the individuals were "scared to death". We\I announced we were the "Police" and for everybody to get down on the floor right away, after the entry into the structure and while moving throughout. Our team did not display the search warrant as we entered, although I did observe it before the raid. I understand that the Flathead team likewise did not display the search warrant while entering the structure. I did not view any arrest warrant, although I was informed one existed for one of the male individual occupants.

12) As part of the pre-raid preparation I was not informed of any occupants membership in any gangs, clubs or associations or other violent groups (e.g., Hells Angels, Bloods, etc.)

AAJ K.12

13) As part of the pre-raid preparation we prepared for 15 (fifteen) individuals as a potential risk of escape or flight for any individual and were informed just before the raid that there were 6-8 individuals. We had more than enough manpower to meet the situation. We were not informed if there were any priors for escape or flight on any individual inside. The risk of escape or flight of any occupant was not extra-ordinary based upon our preparations.

14) As part of the pre-raid preparation we prepared for 15 (fifteen) individuals as a potential risk of resisting arrest and we were informed just before the raid that there were 6-8 individuals. We had more than enough manpower to meet the situation. We were not informed if there were any priors for resisting arrest on any individual inside. The risk for resisting arrest was not extra-ordinary based upon our preparations.

15) As part of the pre-raid preparation we were not concerned that any occupant nor all of them would destroy an entire meth lab in the short time it took to get from the Sanders County meeting place to the house. We heard no flushing of toilets. We observed no cleaning activities consistent with someone trying to hide illegal activities. We had more than enough manpower to act quickly.

16) As part of the pre-raid preparation we were not informed of any individual possessing a weapon, displaying a weapon or of any individual having prior weapons charges. However, there was mention of the purchase of ammunition for I believe a 44 caliber gun which was of concern to the teams.

17) As part of the pre-raid preparation we were not informed of any individual having a felony, except for Mr. Klein, which I understood was a non-violent felony and his warrant for arrest was in violation of parole\probation.

18) As part of the pre-raid preparation we were not informed of any individual occupant making specific threats against law enforcement (e.g., Thompson Falls Police, Sanders County Sheriff, etc.) with the purpose of harming anyone.

19) As part of the pre-raid preparation we were not informed nor did we encounter any "booby traps" or additional fortification of the house (e.g., special steel doors, attack dogs, etc.).

20) Our camouflage colored (Woodland) tactical gear displays large raised letters that we are the Police Department. We did use helmets and goggles in the raid and seizure. We did use bullet proof vests. Our team held shotguns with live ammo while executing the search warrant. We did not use shields, hoods or flash bombs.

AAB K-12

21) Our team secured 4 (four) individuals on the top floor, 2 (two) males and 2 (two) females. I am not aware of their names, as our purpose was to secure the residence and turn it over to the Thompson Falls Police Department as soon as possible. The seized individuals were turned over to the Thompson Falls Police Department with no injuries to suspects or officers.

22) Your Affiant Sayeth Further Not.

Dated this 23 day of October, 2000

Allen Bardwell

SUBSCRIBED AND SWORN to before me this 23 day of October, 2000.

NOTARY PUBLIC in and for the State of Montana residing at Kalispell.
My Commission expires: 4-15-2002